(3)

No. 90-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. CATHEY and BETTE CATHEY,

Petitioners

v.

THE DOW CHEMICAL COMPANY
MEDICAL CARE PROGRAM,

Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Did the Court of Appeals err in affirming the District Court's interpretation of the ERISA plan?

2. Does ERISA preempt state laws relating to unfair insurance claims practices?

LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of the case. There are other parties in the state court action referred to by the petitioners. They are:

1. Metropolitan Life Insurance Company
2. Michael H. Maddolin
3. The Dow Chemical Company

The Dow Chemical Company Medical Care Program is not a named party in the state court action although the same issue of coverage under the Plan is involved.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Dow Chemical Company Medical Care Program ("Dow Program"), respectfully requests that this Court deny the petition for writ of *certiorari*, by which petitioners seek review of the Fifth Circuit's judgment. The opinion of the Fifth Circuit is reported at 907 F.2d 554 (5th Cir. 1990).

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254 (1988).

STATUTES INVOLVED

The petitioners' statement of statutes involved is correct.

STATEMENT OF THE CASE

A. Factual Background

The Dow Program is an employee welfare benefit program governed by the provisions of ERISA. As found by the District Court in its amply supported findings of fact (A-29; R. 72)[1], James C. Cathey, a retiree of The Dow Chemical Company, and his wife, Bette Cathey, brought suit against the Dow Program under 29 U.S.C. § 1132 of ERISA. The Catheys, as covered participants of the Dow Program, sought recovery for the Dow Program's denial of a claim for medical benefits, specifically around-the-clock, in-home skilled nursing care for Mrs. Cathey (A-29, No. 1; R. 72, No. 1).

In late 1984, the Dow Program offered an option of two distinct health benefit plans, referred to as the "Old" Plan and the "New" Plan (A-29, No. 6; R. 72, No. 6). The Old Plan provided a maximum lifetime benefit of $50,000, whereas the New Plan provided a maximum lifetime benefit of $1 million. Until December 1984, James Cathey and his wife were covered by the "Old" retiree medical care plan. At that time, Mr. Cathey voluntarily opted for the "New" retiree medical care plan (Tr. 96; A-30, No. 6; R. 72, No. 6). As do most medical plans, the Dow Program contains limitations on the coverage it provides, with only certain types of medical needs and care covered (A-55; DX-31).

As described in the Summary Plan Description ("SPD"), the New Plan contained restrictions and limitations on coverage—requiring that claim expenses for benefits must have been actually incurred for expenses to be covered by the plan (A-57-58; DX-31,

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[1] The record on appeal is designated "R". The trial testimony transcript is designated "Tr". Exhibits are designated "DX" for Defendant-Respondent's exhibits and "PX" for Plaintiffs-Petitioners' exhibits. The District Court's factual findings were not disturbed on appeal. The Appendix to Petition is hereafter referred to as "A".

pp. 11-12) and requiring that the expenses must be *necessary* for health care (A-57; DX-31, p. 11) to be covered. The New Plan also specified that "custodial" care is not covered. Custodial care is defined by the New Plan. It provides that:

> Care is considered 'custodial' when it is *primarily* to meet personal needs and could be provided by persons without professional skills. (Emphasis added)

(A-59; DX-31, p. 13). In addition, the New Plan contains specific provisions and limitations on "Home Health Care." Specifically, the New Plan provides:

> Typical services available through approved home health care agencies—and eligible for Plan coverage—include . . . registered nurses. . . . However, expenses related to services for housekeeping *or custodial care are not covered by the Plan.* (Emphasis added)

The number of such home health care visits is limited to a maximum of fifty per calendar year (A-60; DX-31, p. 14; A-32, No. 12; R. 72, No. 12).[2]

Mrs. Cathey suffers from severe multiple sclerosis and is unable to care for herself without assistance (Tr. 79, 82; A-30, No. 5; R. 72, No. 5). Beginning in late October 1982, the Catheys secured the services of a registered nurse who worked eight hours during the day, Monday through Friday (Tr. 17). At the time, Mr. Cathey was still working at his job for The Dow Chemical Company (Tr. 48; A-30, No. 7; R. 72, No. 7). The Dow Program paid for the services based upon claims presented to it by the Catheys (Tr. 97). In late 1983, the Dow Program's claims consultant[3]

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[2] While the Catheys' claim for around-the-clock, in-home skilled nursing care was denied under the New Plan in early 1985, coverage for home health care visits, consistent with the New Plan's terms, was expressly authorized (A-69-70; DX-27; A-68; DX-28).

[3] Metropolitan Life Insurance Company is the designated claims administrator of the Dow Program. Michael Maddolin is an employee of Metropolitan.

reviewed the nursing services being performed, and, based upon the representations of Mrs. Cathey's doctor, it was decided to continue reimbursement for the nurse's services (DX-16; A-30-31, No. 8; R. 72, No. 8).

In late 1984, a routine review of the claims submitted by the Catheys for the in-home services of a registered nurse was undertaken by the Dow Program's claims administrator. After receipt of detailed descriptions of the services actually being performed by the nurse, the claim was denied on January 25, 1985 (Tr. 98, 101-103; A-64-65; DX-20; A-31, No. 9; R. 72, No. 9). The Dow Program denied the claim for around-the-clock, in-home nursing care for Mrs. Cathey because the duties prescribed and being performed by the registered nurse were not medically necessary, were primarily custodial in nature and could be performed by a person without professional training (Tr. 29, 30, 40-41, 42, 45, 53, 75-78, 84; A-32, No. 13; R. 72, No. 13).[4] The testimony of Mrs. Cathey's doctor confirmed that the predominant nature of these services were custodial in nature and that the services did not require a registered nurse to provide them (Tr. 75-78).

The Catheys appealed the decision through the internal appeals procedure (DX-21; DX-25). Upon review of the services actually performed by the nurse and consultation with another doctor (DX-22), the Dow Program affirmed its initial decision (A-69-70; DX-27; A-68; DX-28).

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[4] Mrs. Cathey's doctor testified that the duties being performed by the registered nurse were exactly the duties he prescribed. These duties included giving oral medication, checking vital signs, observing for bedsores, watching for seizures, bathing, clothing, preparing of special food, feeding, assisting her into and out of her bed and in and about the home, and being a companion to her (Tr. 27, 40-42, 45-46, 53). The nurse also performed various speech, physical and occupational therapy exercises with Mrs. Cathey (Tr. 25, 29, 42-44, 76). Reports to the doctor were to be made every four months (Tr. 33, 46, 88; A-32, No. 14; R. 72, No. 14).

The Dow Program, in its decision on the claim, specifically advised the Catheys that other services, such as physical therapy and periodic visits from a registered nurse for evaluation of Mrs. Cathey's condition and reporting to her doctor, were and would be covered consistent with the terms of the New Plan (A-69-70; DX-27; A-68; DX-28). These covered services continued to be performed, and the charges were paid by the Dow Program (DX-39; A-31, No. 11; R. 72, No. 11).

The trial court concluded that custodial care such as that provided by the nurse may, indeed, be necessary for the well being of a patient. However, this fact does not mean that the care is covered by the terms of the Dow Program. The trial court found that it was clear that the services were "primarily custodial" and were not covered by the terms of the Plan (A-32, A-33, No. 16; R. 72, No. 16).

B. Procedural History

The Court of Appeals, after considering the trial court's findings of fact and interpretations of the Plan, which were made following a full trial on the merits, affirmed that the Plan was not required to provide around-the-clock skilled nursing care. The case was reversed and remanded in part, since all parties agreed that petitioners would be entitled to benefits for non-custodial nursing services under the "Home Health Care" portion of the Plan and that the performance of some custodial functions during such visits would not eliminate coverage of the medically necessary services. 907 F.2d at 560-562; (A-24-28).

In its decision, the Fifth Circuit provided petitioners the type of judicial review that they now seek in this Court. The Fifth Circuit accepted petitioners' argument that the claims denial decision should be reviewed *de novo*, and the Court considered the claims decision in accordance with its view of the "plain meaning" of the Plan's terms and "without deferring to either party's

interpretation . . . ", as required by this Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 955, ____ U.S. ____ (1989).

Petitioners simply disagree with the result reached by the Fifth Circuit. If disagreement with a properly decided contract dispute were a basis for review by this Court, every question of contract interpretation would ultimately lie at this Court's doors. Such a result is neither required nor permitted.

REASONS FOR DENYING THE PETITION

I. THIS IS A CASE OF ORDINARY CONTRACT INTERPRETATION RAISING NO SPECIAL OR IMPORTANT ISSUES

Supreme Court Rule 10.1 provides that a review on the discretionary writ of certiorari will be granted "*only* when there are special and important reasons therefor . . . " (Emphasis added). Acceptable reasons for the extraordinary grant of a writ of certiorari include conflicting decisions of the United States Court of Appeals on the matter; a federal question conflict between a decision of a federal Court of Appeals and State Court of last resort; a conflict with an applicable decision of this Court; or a decision that "has so far departed from the acceptable and usual course of judicial proceedings, or a sanction of such a departure by a lower court, as to call for an exercise of this Court's power of supervision". U.S. Sup. Ct. Rule 10.1.

Petitioners argue that the Fifth Circuit "so far depart[ed] from the accepted and usual course of judicial proceedings . . . " that the Court should grant certiorari (Petition at 23-24). In essence, petitioners want this Court to review the decision simply because they failed to convince the Fifth Circuit and the District Court on the merits of the ERISA claim. This Court long has been

> consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the par-

> ties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Lane v. Bowler Corp., 261 U.S. 387, 393 (1923). In effect, petitioners are asking this Court to accept this case in order to reverse "factual determinations in which the district court and the court of appeals have concurred . . . ", a practice in which this Court does not engage. *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1979); *see also National Labor Relations Board v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (Cross-petition for certiorari dismissed as improvidently granted because it presented "primarily . . . a question of fact, which does not merit Court review . . .")

The crux of the petitioners' position is that the Fifth Circuit's decision ignored the "elementary rule of contract construction that contract language is construed against the drafter . . ." (Petition at 22) and violated the proper "construction of the contract that the parties made for themselves . . ." (Petition at 21). This argument fails.

A. The Court of Appeals followed the proper rules in interpreting the Plan's Provisions.

The Fifth Circuit followed standard rules of contract interpretation in construing the Plan provisions, utilizing *de novo* review, made "without deferring to either party's interpretation." *Firestone Tire & Rubber Co. v. Bruch*, 107 S. Ct. 948, 955, _____ U.S. _____ (1989). The Fifth Circuit recognized that, in reviewing petitioners' claim *de novo*, it was "more likely to disagree with the fiduciary's claims determination . . ." 907 F.2d at 558; A-21. The Fifth Circuit did not accept the petitioners' "strained interpretation . . .", and simply "declined to interpret such provisions contrary to their plain meaning . . ." 907 F.2d at 561; A-26.

Petitioners assert the Court should have applied other common law rules of contract interpretation, including the doctrine of

contra proferentem. Thus, reason petitioners, their interpretation prevails and the Fifth Circuit erred in applying the "plain meaning" of the Plan's terms.[5] Rules of interpretation serve as aids in ascertaining the intent of the parties as embodied in the written document. 17A C.J.S. *Contracts* § 294 p.23 (1963); Restatement (Second) of Contracts § 202, p.86 (1981). The principles independently establish no rule of law ascribing meaning. Indeed, the principle of interpretation that a contract is to be construed against its maker is the last principle of interpretation, to be utilized only when other canons have failed to show the intent of an ambiguous provision. *See, e.g., DeGeare v. Alpha Portland Ind., Inc.*, 837 F.2d 812, 816 (8th Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 1305 (1989); *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 714 n.15 (7th Cir. 1985); *Schering Corp. v. Home* Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983); *Combined Comm. Corp. v. Seaboard Surety Co.*, 641 F.2d 743, 745 (9th Cir. 1980); *Quad Constr. Inc. v. Wm A. Smith Contracting Co.*, 534 F.2d 1391, 1394 (10th Cir. 1976); 17A C.J.S. *Contracts* § 324 pp. 224-25 (1963). Simply put, there is no reason to grant review.

B. The Dow Program's interpretation of the Plan was properly affirmed by the District Court and Court of Appeals.

The lower courts' interpretation of the Plan was correct.[6] The Dow Program agrees that the distinction between the two provi-

[5] Petitioners appear to acknowledge that looking to a contract's terms and giving them their plain meaning is an accepted canon of construction and the "starting point" for interpretation. (Petition, pp. 14, 17). Many of their further arguments (*e.g.*, Petition pp. 18-21) simply presuppose a version of the facts which the lower courts rejected. The providing of benefits initially was based upon petitioners' representations, *not* an interpretation of the Plan.

[6] Petitioners also assert that this Court should grant review, because the Fifth Circuit stated that the available benefits under the Plan were limited to the Home Health Care section, rather than the Personal

(footnote continued on next page)

sions of the plan, "Personal Physician" and "Home Health Care", was not focused upon by the parties or the district court below. There, the sole issue was whether the care provided to Mrs. Cathey was primarily custodial. *All* agreed that the Plan did provide coverage for medically necessary services and did not provide coverage for custodial services (Tr. 5, 6, 8). The Dow Program defended below on the grounds that the registered nursing services were not medically necessary and that the services being provided were custodial. Petitioners argued the care was medically necessary and was not custodial.

Having lost the battle in the district court that the services being provided were primarily custodial and did not require a registered nurse to perform them, the Catheys changed emphasis and argued to the Fifth Circuit[7] and to this Court (Petition pp. 20-23) that custodial services were not excluded because the in-home registered nursing services were actually covered under the "Personal Physician" provisions, which they asserted did not exclude custodial services.

1. *The Plan Does Not Provide For Unlimited In-home Nursing Care.* The Catheys now claim that, since the Old Plan paid for nursing services under the Supplemental Benefits coverage, the

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Physician section. (Petition at 18). That argument ignores the fact that the District Court found, under either a *de novo* or an abuse of discretion standard, that the claims were properly denied under the Personal Physician Section of the Plan, because the around-the-clock skilled nursing care would be predominantly custodial in nature and did not require a skilled nurse. (A-32). The Fifth Circuit did not question, or find clearly erroneous, that factual finding with respect to the Personal Physician portion of the Plan. 907 F.2d at 560; (A-24). Therefore, the decision to deny the claims for around-the-clock skilled nursing care under the Personal Physician Section of the New Plan is supported both by the Fifth Circuit's interpretation of the Plan and the District Court's factual finding after *de novo* review. Petitioners' asserted "conflict" between the reasoning of the District Court and the Fifth Circuit would not change the decision on the merits one iota.

[7] Brief of Appellant (pp. 13-15).

New Plan must now provide unlimited in-home registered nursing services under the Personal Physician coverage.[8] What petitioners gloss over in their argument to this Court is the undisputed facts. Dr. Torp, Mrs. Cathey's physician, testified that an LVN (licensed vocational nurse) could provide the services (Tr. 75-78),[9] as could one with no formal medical training (Tr. 75-78). Where services can be performed by one not a registered nurse, the use of a registered nurse to provide those services is simply not medically necessary. Since a registered nurse is not required, the Personal Physician provision upon which they rely is not applicable. The District Court's well girded factual findings, upheld by the Fifth Circuit, demonstrate this fact (A-32, Nos. 14-15; R. 72, Nos. 14-15).

Aside from ignoring the evidentiary basis demonstrating the inapplicability of this provision to their position, petitioners argue strained interpretations of correspondence sent after the denial to support their position. The March 8 denial letter unequivocally states that in-home nursing care is limited to 50 visits per year. It states that in-home care is

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[8] The Petitioners' continued claim that the Old Plan and the New Plan should be read as one document was correctly rejected by the Fifth Circuit. The S.P.D. (Summary Plan Description) carefully and clearly distinguishes the provisions of the two plans (DX-31 overlay, and pp. 1, 2, and 10). The fact that some of the provisions of the New Plan and the Old Plan are similar cannot ignore the fact that the New Plan includes a limitation on the amount of home health care. The New Plan defines and excludes custodial care. The New Plan, unlike the Old Plan, provides for home health care, otherwise excluded from coverage. Further, the New Plan, as did the Old Plan, expressly excludes care which is not "medically necessary" under prevailing medical standards.

[9] Dr. Torp, in a letter dated November 5, 1984, said that the in-home services could be performed by one not a registered nurse (DX-17). The fact that the Personal Physician provision only covers services provided by a *registered* nurse (A-60; DX-31, p. 14) perhaps explains why the Petitioners did not argue at trial what they now urge.

> covered under the New Plan and 100% of the reasonable and customary costs up to a maximum of 50 visits in a calendar year for up to four (4) hours per visit, if provided through an approved home health care agency. The physical therapy services Mr. McArdle describes would be covered at 80% of the reasonable and customary charges.

(A-68; DX-28). *The basis for payment of the nurse's services was the therapy services performed* by the nurse, *not* any medically necessary care requiring a registered nurse.[10] The therapy services were authorized under the Personal Physician coverage (at 80% coverage subject to the 365 day limitation).

The simple fact is that the evidence below clearly showed the care being provided was custodial and all services being performed did not require a registered nurse. Coverage under the Personal Physician provision of the Dow Program was properly denied. However, coverage of medically necessary care is covered under the Home Health Care and therapy provisions of the Plan. This is what the Dow Program's administrators held (A-68; DX-28).

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[10] It was the therapy services that the claims consultant found covered (A-64-65; DX-20); it was these services which were found medically necessary and covered by the Plan (A-64-65; DX-20; A-69-70; DX-27) and which formed the basis for the Plan's payment at 80% to the nurse (A-68; DX-28, 26).

Petitioners additionally rely on a May 7, 1985 letter from the Plan's attorney (Petition pp. 21-22). This letter is consistent with the other actions and communications of the Dow Program. It is not now, nor has it ever been the position of the Dow Program that all nursing services are covered under the Home Health Care provision. Indeed, registered nursing services are clearly listed under the Personal Physician provision (A-74; PX-30, p. 1). As the letter pointed out, the New Plan does provide coverage for 80% of in-patient or out-patient medically necessary, skilled nursing care. Nursing care provided in the home under the Home Health Care provision is covered at 100%. The Dow Program's interpretation of its provisions has been consistent and in accordance with the reasonable interpretation of the Personal Physician and Home Health Care provisions.

II. ERISA PREEMPTION IS NOT PROPERLY AT ISSUE AND IS WELL SETTLED BY PRIOR DECISIONS OF THIS COURT.

In the last several pages of their petition, petitioners attempt to justify their request for *certiorari* by portraying this as an opportunity to decide principles of ERISA preemption (Petition at 24-28). Petitioners make oblique references to ERISA's "saving" and "deemer" clauses, and suggest that this is a reason to review this case. Petitioners apparently anticipate a ruling from the Texas Supreme Court - in a different lawsuit involving the same coverage issue under the Dow Program but naming other defendants - that ERISA will preempt the petitioners' state law theories of recovery. Petitioners concede, as they must, that the ERISA preemption issue is "not ripe for decision, because the Texas Supreme Court has not yet ruled . . ." (Petition at 28).

Even if the Texas Supreme Court had already ruled in favor of respondent on the ERISA preemption question, this holding would be both consistent with and mandated by the prior decisions of this Court. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); and, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, ___ U.S. ___ (1990). Since this Court has ruled that ERISA's exclusive civil enforcement mechanism preempts all state law remedies, a ruling by the Texas courts in favor of ERISA preemption of petitioners' state law theories of recovery will not provide a basis for a writ of *certiorari*.

CONCLUSION

The questions that petitioners raise are neither special nor important. The contractual interpretation and factual findings made by the Fifth Circuit and the District Court involve no unsettled questions of law and are entirely consistent with the prior rulings of this Court on ERISA claims matters. Respondent respectfully submits that this petition should be denied.

Respectfully submitted,

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